



## Notre Dame Law Review

---

Volume 66

Issue 3 *Colloquium: Teaching Trial Advocacy in the  
90s and Beyond*

Article 4

---

6-1-1999

# NITA and the University

Ronald J. Allen

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Ronald J. Allen, *NITA and the University*, 66 Notre Dame L. Rev. 705 (1991).

Available at: <http://scholarship.law.nd.edu/ndlr/vol66/iss3/4>

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

## NITA and the University

Ronald J. Allen\*

*The object of all criticism is not to criticise, but to understand. More than this. As you will find it more wholesome in life & more salutary to your own characters to study the virtues than the defects of your friends, so in literature it seems to me wiser to look for an author's strong points than his weak ones . . . . I would not advocate a critical habit at the expense of an unquestioning & hearty enjoyment of literature in & for itself.*

—James Russell Lowell<sup>1</sup>

When first asked to participate at the conference on "Trial Advocacy Teaching in the 90s and Beyond," I demurred on the ground that I had no warrant to remark on matters beyond my competence. Rather than expressing puzzlement at my answer because ignorance had never seemed to stop me before, the organizers of the conference indicated that integral to their plan was, as it was put to me, "outside criticism." Concluding that "outside criticism" is within my expertise, I accepted the invitation only to find myself on a panel entitled: "What is Missing from the NITA Model?" My initial thought upon this discovery mirrored my initial thought upon being asked to participate at the conference, but that thought was soon pressed out of my mind by the irresistible intrusion of the sentence, "It depends." The answer to "What is Missing from the NITA Model" depends upon a two-fold inquiry: on what it is, on which I am not only an outsider, but perhaps not well-informed; and on what it could or should be, on which, perhaps, I am competent to speak. If I am competent to address this latter question, it is not because of my interest in the nature of evidence, inference, rationality, or human decision mak-

---

\* Professor of Law and Stanford Clinton, Sr. Research Professor, 1990-91, Northwestern University.

1 J. Lowell, *Criticism and Culture* 2-4 (n.d.) (unpublished manuscript from the Houghton Library Manuscripts, Harvard University), *quoted in* L. VEYSEY, *THE EMERGENCE OF THE AMERICAN UNIVERSITY* 187 (1965).

ing, although I take it that the possible relationship between these interests and the NITA program may explain why I was invited. Rather, part of the answer to what the NITA program could or should be may come from its relationship to the university, where it finds its home and of which it is apart, and that is the issue I wish to address.

It should now be apparent that I am not quite going to address the precise question that entitles this panel. The question I will address is, what might the NITA model be, as taught in the American universities to university students, were it to reflect the highest aspirations of the American university. That is a separate question from the value or role of NITA in some other setting; indeed, it is a separate question from what the NITA model is in any setting, including this one. You here know the answer to that far better than I. I will instead examine the nature of the American university, and what an educational program focusing on trial advocacy might do to advance the aspirations of the larger community.

Much evaluative discussion often seems curiously beside the point just because there is no agreement as to the nature of the entities under evaluation. By specifying precisely the paradigm, its implications can be worked out precisely, and in addition criticism of the paradigm itself is facilitated. Accordingly, I will try to state precisely what I perceive to be the aspirations of the American university, and the relationship of a trial advocacy program to them. The argument may then be criticized either for its erroneous analysis of their relationship or for erroneously specifying the nature of the university.

## I. THE NATURE OF THE AMERICAN UNIVERSITY

The place to begin the story of the modern university is with its history. Whether written by advocates of particular conceptions of the modern university, or by those with a less obvious agenda, the intellectual histories of the American university consistently attribute its development to the reaction against dogma in the three decades following the Civil War.<sup>2</sup> Until then, the intellectual history of the American university, which is in fact the intellectual

---

<sup>2</sup> See, e.g., L. VEYSEY, *supra* note 1; J. CAMERON, ON THE IDEA OF A UNIVERSITY (1978); F. RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY (1962); T. VELEN, THE HIGHER LEARNING IN AMERICA (1918). Much of what follows is deeply indebted to Veysey's wonderful history.

history of the college, is rather straightforward. The college existed, according to Lawrence Veysey, "to provide a four-year regime conducive to piety and strength of character."<sup>3</sup> Williams A. Sterns, the president of Amherst College until 1876, would describe the college's role as inculcating "[r]everence for the aged, veneration for parents, for sacred institutions, for wisdom and goodness in character."<sup>4</sup> Religious and educational orthodoxy were virtually inseparable. Princeton's president, James McCosh, could intone: "Religion should burn in the hearts, and . . . from the faces of the teachers: and it should have a living power in our meetings for worship, and should sanctify the air of the rooms in which the students reside. And in regard to religious truth, there will be no uncertain sound uttered within these walls."<sup>5</sup>

Piety was furthered and strength of character developed through mental discipline. The prevailing belief was that the soul possessed "faculties" with specific capacities such as intellect, piety, and emotion. The primary role of higher education was to discipline these faculties to bring out the best that was latent in them. On his inauguration, McCosh opined:

I do hold it to be the highest end of a University to educate; that is, draw out and improve the faculties which God has given. Our creator, no doubt, means all things in our world to be perfect in the end; but he has not made them perfect; he has left room for growth and progress; and it is a task laid on his intelligent creatures to be fellow-workers with him in finishing that work which he has left incomplete.<sup>6</sup>

The desired improvement was to be brought about through diligent and grinding mental effort. "Accepting the strenuous morality of traditional Protestantism, these academics gloried in exertion for its own sake," says Lawrence Veysey.<sup>7</sup> William F. Allen of Wisconsin declared, in a statement too descriptive of modern law schools to be comfortable:

The student who has acquired the habit of never letting go a puzzling problem—say a rare Greek verb—until he has analyzed its every element, and understands every point in its etymolo-

---

3 L. VEYSEY, *supra* note 1, at 9.

4 Quoted in *id.* at 7.

5 J. MCCOSH, AMERICAN UNIVERSITIES—WHAT THEY SHOULD BE 42 (1869), quoted in L. VEYSEY, *supra* note 1, at 26.

6 Quoted in L. VEYSEY, *supra* note 1, at 7.

7 L. VEYSEY, *supra* note 1, at 24.

gy, has the habit of mind which will enable him to follow out a legal subtlety with the same accuracy.<sup>8</sup>

And C.B. Hulbert of Middlebury College added: "If you wish to develop physical power, put your physical organs to drill; if you seek to bring your mental powers up to a high degree of efficiency, put them to work, and upon studies that will tax them to the uttermost."<sup>9</sup> There was general agreement that the curriculum should consist of Greek, Latin, mathematics, and moral philosophy, subjects that taxed the faculties to the utmost but did not put the student at risk of entertaining heretical ideas.

Modern university folklore dates the revolution against dogma in the universities to the founding in 1876 of Johns Hopkins University and the appointment of its first president, Daniel Coit Gilman. Gilman quite deliberately emulated the German research universities and certainly was instrumental in a chain of events whose culmination is the great American research institutions of today. As important to the formulation of the research university as this event was, and as comforting as it might be to think that the modern university sprang full blown from Gilman's head in opposition to its dogmatic predecessors, it was preceded by a reaction of a very different sort. In the late 1800s the universities increasingly were perceived as isolated pockets of irrelevance surrounded by a dynamic, progressive society. A banker in 1889 announced that he would no longer hire college graduates, a view to which Andrew Carnegie was at least sympathetic:

While the college student has been learning a little about the barbarous and petty squabbles of a far-distant past, or trying to master languages which are dead, such knowledge as seems adapted for life upon another planet than this as far as business affairs are concerned, the future captain of industry is hotly engaged in the school of experience, obtaining the very knowledge required for his future triumphs . . . . College education as it exists is fatal to success in that domain.<sup>10</sup>

The astounding successes of applied science and technology emphasized the seeming uselessness of the college curriculum. Thus

---

8 W. ALLEN, *ESSAYS AND MONOGRAPHS* 141 (1890), *quoted in* L. VEYSEY, *supra* note 1, at 24.

9 C. HULBERT, *THE DISTINCTIVE IDEA IN EDUCATION* 11 (1890), *quoted in* L. VEYSEY, *supra* note 1, at 24.

10 U.S. COMM'R OF EDUC., *REPORT* 2, at 1143 (1889-90), *quoted in* L. VEYSEY, *supra* note 1, at 13-14.

arose the demand for relevance. A college education, it began to be widely believed, should do more than tax the mind; it should prepare the student to live in and contribute to contemporary society.

In the first bloom of enthusiasm for relevance, the central concern was vocational training. The prototypical attitude was captured by Ezra Cornell, who announced that he would endow a university "where any person can find instruction in any study."<sup>11</sup> The Morrill Act further coupled utility to the mission of the university by encouraging the creation of agricultural and engineering schools.<sup>12</sup> But the emphasis on vocational training was soon tempered by two factors. The first was the recognition that the universities had no competitive advantage in certain forms of instruction. As an advocate of technical training said, the university should focus on "the artist rather than the artisan; the engineer, not the craftsman; the freeman, not the slave."<sup>13</sup> The second factor was a view that understood vocational training

in a sweeping social sense rather than in a precisely vocational one . . . .

Higher education, it was hoped, might affect the conduct of public affairs in at least three ways. First, the university would make each of its graduates into a force for civic virtue. Second, it would train a group of political leaders who would take a knightly plunge into 'real life' and clean it up. Finally through scientifically oriented scholarship, rational substitutes could be found for political procedures subject to personal influence.<sup>14</sup>

Integral to the demand for relevance was research, but applied rather than pure. Research was to be judged by its ability to contribute directly to the improvement of mankind.

A very different idea of research spawned the development of a rival conception of the university. This idea was that of pure research in the idealized German model, the idea modern folklore attributes, with some justification, to the founding of Johns Hopkins.<sup>15</sup> Whereas the demand for relevance perhaps was pri-

---

11 Ezra Cornell, *Address*, 1869 CORNELL UNIV. REG. 17. According to a colleague who shall remain nameless, legend has it that Andrew D. White, Cornell's first president, responded, "But Ezra, we'll be inundated with students." To which Cornell replied, "Not where I'm going to put it."

12 L. VEYSEY, *supra* note 1, at 70-71.

13 Woodward, *The Change of Front in Education*, 14 SCIENCE 478 (1901).

14 L. VEYSEY, *supra* note 1, at 72.

15 See Grassmuck, *Some Research Universities Contemplate Sweeping Changes, Ranging*

marily a reaction to the perceived uselessness of college training, interest in research was fueled on the one hand by the obvious success of scientific inquiry and on the other by a growing resistance to the dogmatic character of higher education.<sup>16</sup> Facts were the means of displacing preconceptions, the "sledge hammers that shatter introspective theories,"<sup>17</sup> that crushed superstition. And it was morally good. Pure research could only occur with brutal honesty: "Its austerity would form a valuable counterweight to the commercial materialism of the larger society. Scientific inquiry thus would automatically promote 'the highest civilization.'"<sup>18</sup>

A third consequence of the emphasis on pure research was a celebration of ideas and knowledge for their own sake. This fact ties it to the last of the formative movements of the American university composed of those individuals who saw the highest good to be the preservation and propagation of the good in society. The university, said Alexander Meiklejohn,

is not primarily to teach the forms of living, not primarily to give practice in the art of living, but rather to broaden and deepen the insight into life itself, to open up the riches of human experience, of literature, of nature, of art, of religion, of philosophy, of human relations, social, economic, political, to arouse an understanding and appreciation of these, so that life may be fuller and richer in content; in a word, the primary function of the American college is the arousing of interests.<sup>19</sup>

But this goal could not be achieved within the stultifying confines of pre-Civil War colleges. Both the content of the curriculum and the method of instruction mattered very much. The central metaphor was not that of grinding down to appropriate measure the untrained mental faculties, but instead of liberating thought so that the richness of culture could be appreciated. The results were the personal betterment of the student and the improvement of society. The educated and cultured person was a person

---

*From Management and Tenure to Teaching Methods*, 37 *Chronicle Higher Educ.*, Sept. 12, 1990, at A1, A31.

16 For the best known manifesto of this particular view, see T. VELEN, *supra* note 2.

17 J. COULTER, *THE ELEMENTS OF POWER* 11-12 (1894), *quoted in* L. VEYSEY *supra* note 1, at 137.

18 L. VEYSEY, *supra* note 1, at 139.

19 Meiklejohn, *College Education and the Moral Ideal*, 28 *EDUC.* 552, 558 (1908).

of deep character, broad vision, and charity.

But we now come full circle. The proponents of liberal culture were distinct from but allied in a curious way with both the proponents of utility and of research. Each reform movement was significantly a reaction to a dogmatic past in which the university came to be viewed as the proper setting for free inquiry. The full story is obviously more complicated than this, and the motives of the various reformers were complex and varying in their attractiveness.<sup>20</sup> Nonetheless, the modern American research university emerged from this mix of service to society, research, and transmittal of culture. Despite the fracturing power of the increasing specialization of knowledge and the departmentalization of universities, the modern American research university still bears this imprint.

## II. TRIAL ADVOCACY AND THE ASPIRATIONS OF THE UNIVERSITY

Suppose that the modern American university is conceptually organized along the three directions just specified—that the modern vernacular of service, research, and teaching reflects the historical roots of these words. Suppose, in other words, that when university faculty speak of service, they mean service to the wider community of which the university is a part in ways in which universities have competitive advantages over other institutions of modern life; that when they speak of research, they mean pure research that liberates the intellect; and that when they speak of teaching, they mean the husbanding and transmitting of the best that the culture has to offer. What would a program forged in that light and explicitly focused on trial advocacy consist of?

One is immediately struck by the wonderful possibilities. The trial process is the fulcrum separating the realities of everyday life from the artificial world of the law. It channels the raw materials of the one into the other, and directs the legally refined output back into the larger community. The trial is the gatekeeper of information flowing in both directions, and the techniques of advocacy are central to its functioning. The advocates determine the raw material to be fed into the legal process, shape it, and

---

20 One of the attractions of the German model, for example, was the elevated role of the professoriat, and one of its features was an intolerance for dialogue resulting from the belief that justified knowledge could be obtained. Once more, I direct the reader to L. VEYSEY, *supra* note 1, for a much more complete account.



thus partially but significantly determine the final product. The case is in substantial measure what the advocates make of it, which in turn determines what the legal system does with it. The effect of the trial advocates continues beyond the end of the trial. Virtually all appellate decision making is premised on the record, but the advocate creates the record. Thus, if technical trial skills are not abstracted from their context, virtually the whole of legal life, and thus in essence the whole of life, emerges as the proper object of study for the student of advocacy.

How does one begin to study life, legal or otherwise? This is a daunting question, but it is no more daunting here than anywhere else in science or academia. Politics, economics, constitutional law, and the law of evidence likewise intersect much of modern life, as does virtually any topic fit for study by mature intellects. The key to progress in these fields is that they possess global conceptualizations and theories that organize the fields and give guidance to research. Moreover, the only competitive advantage that the university has over other institutions in society is on the conceptual plane. If there is a role for nonconceptual training, it is better served by those who—unlike university faculty—engage in that kind of activity; and if there is a need for it, the demand will undoubtedly generate the supply. Even if there is agreement that the competitive advantage of the universities is on the conceptual level, often there are competing conceptions that inform and drive different schools of thought. But this is beneficial rather than regrettable. The competition between different theories both stimulates the creation of new knowledge and acts as a check upon dogma. Indeed, the key to progress is not to have a single global theory, for that is the prescription for complacency. Rather, the key is to have ideas in competition with each other.<sup>21</sup>

This particular key opens the doors of each of the three aspirations for a modern university identified above. One cannot coherently speak of service to the wider community without a theory of the needs of that community and the manner in which the training of advocates serves them.<sup>22</sup> One cannot speak of the pursuit of knowledge without a theory to be put to the test, and

---

21 For a wonderful discussion of the enormously complex epistemological views latent in the textual sentence, see S. TOULMIN, *HUMAN UNDERSTANDING* (1972).

22 My own theory of service is that the law schools are training the single most important group of national leaders in our society, and substantial amounts of their training should be directed to that end.

one cannot speak of husbanding and transmitting the best that society has to offer without a theory that separates the wheat from the chaff.

Theories do not just exist; they have to be created. The manner in which this occurs is itself theory bound and controversial in many respects, and I have no solutions to these controversies. There is a consistent thread in the thinking about theory generation, though, which is that irritants give rise to the search for solutions, and the search for solutions generates theories. From an outsider's viewpoint, it seems like the field of trial advocacy is ripe for a breakthrough of theories. There appear to be a number of irritants that, rather than being viewed as a cause for despair, should be viewed as possessing the potential for discovery.

Let me give two related examples. The first addresses the interesting tension created by atheoretical skills training. An example is the apparently dogmatic instruction that a cross-examiner should never ask a question to which the cross-examiner does not know the answer. A wonderful instantiation of this is Irving Younger's story of the cross-examiner who, after establishing that the witness could not have seen the event clearly, asked the witness how the witness knew the defendant had bitten off the plaintiff's nose. The answer was that the witness saw the defendant spit it out. I have the impression that this is an oft told tale, but I also have the impression that just as often the storyteller is uneasy telling it, and for good reason. The techniques of cross-examination are presumably to be put to a good use, where the meaning of "good" is provided by some theory. The obvious—although by no means obviously correct—meaning of "good" in the context of trials is truth, yet here the advice is to engage is a process that on its face may detract from truth seeking. This superficially innocuous tale thus entails a horrible conflict. Either the instructor is hypocritical or ill-informed. The instructor is a hypocrite if unjustified advice is deliberately given, or ill-informed if the only advice that can be given cannot be justified.

Generalize this point to the question whether to cross-examine a truthful witness. The standard answer appears to be complex and rife with inconsistency. It begins by arguing that the adversary system, of which cross-examination is a part, is designed to get to the truth. Accordingly, the answer runs, we must do what the adversary system entails. It is a stern master, but it is all we have. The persistent critic, though, presses the matter one step further and says: "But we are asking whether it is appropriate to

cross-examine a truthful witness; to increase the odds that someone we know to be telling the truth will not be believed." Here the answer seems to be: "Who knows the truth? It is not up to the lawyer to determine factual truth; that is for the fact finder." These two answers cannot coexist. There is nothing magical about the adversarial form of factual inquiry. It is merely one method by which investigation may occur. In this method, who has the best access to the evidence? The lawyers, obviously. They spend enormous time pursuing factual leads, organizing data, and searching out solutions to lingering problems, and not once in that process are they constricted by the rules of evidence. If the lawyers cannot know the truth, no one can, and the "adversary system excuse" is seen as a sham.<sup>23</sup>

Now generalize this one step further. Does the entire course of technical skills training seem like a sham? Perhaps so. It purports to be premised on serving the needs of the adversary system's search for truth, but it appears to be premised on the needs of serving the client. Winning, not truthful outcomes, is the apparent goal, and the sense of hypocrisy and of immorality grows, a problem I would predict is exacerbated to the extent that NITA programs are integrated with legal clinics. My experience has been that legal clinics are just as instrumental in their

---

23 The phrase belongs to David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (D. Luban ed. 1983), where he puts it to a different but somewhat analogous use. A good example of the curious role truth plays in the discussions of advocacy courses is contained in the very interesting article, Lubet, *What We Should Teach (But Don't) When We Teach Trial Advocacy*, 37 J. LEGAL EDUC. 123, 132 (1987), where the inability to know something to certainty is taken as equivalent to not being able to know anything, which is then taken as an adequate reason for moving to some other ground to justify advocacy training. The equivalency does not hold, and thus the disposal of truth is inadequate. See Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982). That does not mean there is not some other reason to bracket historical truth, or to approach it in a complex fashion, and I suggest one in the text preceding note 25 *infra*. In any event, if the pursuit of historical fact does not justify skills training, the problems become even deeper. At least it is not obvious to me what theory would justify verdicts based on the skills of the advocate, although perhaps one can be developed. Even a lottery system in which everyone would have a fair chance would seem to be preferable. And of course a "skills based" system has built in social biases, as presumably certain classes will have easier access to more skilled practitioners. Similarly, Hegland's suggestion that advocacy should be taught from a humanistic perspective may be right, but there may be more to it. Again, one needs a theory as to why that approach is correct—in this case a theory that is sensitive to the necessity of differing roles played by different actors. I particularly disagree with, unless I misunderstand, Hegland's suggestion that a more humanistic approach will be beneficial by emphasizing that there may be no right answers to moral dilemmas. Hegland, *supra*, at 80. That seems to me a prescription for complacency.

approach to lawyering as are the large law firms. I suspect the worst of all worlds occurs if some platitudes mouthed by NITA instructors are disregarded by the same instructors the first chance they get in the context of a real case.<sup>24</sup>

Does this mean that skills training does not belong in the university? Not at all. In fact, I draw the opposite conclusion, and I recur once more to the wonderful possibilities. We are in a position to advance knowledge. Those most intimately involved in the trial process are fully aware of the contradictions their efforts involve. One response might be to abandon those efforts, but a better one would be to search for resolutions of the contradictions. Perhaps the theory will arise that forgoes truth as the justification of the adversary system. Perhaps the adversary system does, and should, instantiate a political system of resource allocation. Such a theory, fully articulated, might adequately justify the practices to which I have referred. Perhaps truth is the proper goal, in which case the message may be that a truthful witness ought not be cross-examined and a lawyer ought not be allowed to hide in the adversary system excuse, or perhaps research should be pursued into ways of modifying trials to offset the effects of truth distorting techniques. Alternatively, perhaps analogies can be drawn to some recent work in the theory of evidence indicating the conditions under which the suppression of some information may produce more information.<sup>25</sup> Any of these possibilities is fit for mature inquiry.

When creative thought is liberated, many things tend to come into focus. In conversation and the literature defending atheoretical skills training, certain analogies are drawn, and two interesting ones come to mind: to medical school and to masters' classes in music. Perhaps NITA programs are analogous to both, but let me express minor skepticism, skepticism, I might add, that

---

24 Professor Twining recently articulated the potential conflict between the aspirations of the university and advocacy training in W. TWINING, *RETHINKING EVIDENCE* 22 (1990):

Many techniques of the effective advocate are inimical to the traditional values of a university, for they involve the undermining of rational argument rather than its promotion: they include techniques for keeping relevant information out, for trapping or confusing witnesses, for 'laundering' the facts, for diverting attention or interrupting the flow of argument, and for exploiting means of non-rational persuasion.

25 See, e.g., Allen, Grady, Polsby & Yashko, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359 (1990) [hereinafter Allen et al.].

would be reduced by knowing the theory that permits such analogies to be drawn. First the medical school analogy. This argument has two versions. The first is that skills training is analogous to a class like anatomy. Both impart information necessary to the performance of certain functions. The second version is that skills training is clinical training just like clinical training in the medical schools.

That these analogies are flawed can be understood by specifying the more persuasive analogical connections between the two. Medicine is dedicated to the extirpation of pathology, and the training and research in the medical schools serves that function directly. If there is a pathology in law, one obvious candidate is litigation. Litigation may be for the most part a dead weight loss that reduces productive capacity. If litigation is predominantly pathological,<sup>26</sup> the analogy to the medical schools suggests that the legal profession should be working toward its elimination rather than perpetuating and intensifying it by increasing its costliness.<sup>27</sup>

Perhaps litigation, or some part of it, is not pathological.<sup>28</sup>

---

26 As the economists have demonstrated, holding people liable for their acts is socially beneficial, but there are costs of doing so. *But see* Hylton, *Costly Litigation and Legal Error Under Negligence*, 6 J. L. ECON. & ORGANIZATION 433 (1990), which argues that legal error under certain circumstances may be socially beneficial.

27 Consider the following from Judge Hand:

[T]hat a society so riven that the spirit of moderation is gone, no court *can* save; that a society where that spirit flourishes, no court *need* save; that in a society which evades its responsibility by thrusting upon the courts the nurture of that spirit, that spirit in the end will perish. What is the spirit of moderation? It is the temper which does not press a partisan advantage to its bitter end, which can understand and will respect the other side, which feels a unity between all citizens—real and not the factitious product of propaganda—which recognizes their common fate and common aspirations—in a word, which has faith in the sacredness of the individual.

L. HAND, *The Contribution of an Independent Judiciary to Civilization*, in *THE SPIRIT OF LIBERTY: PAPERS AND ADDRESSES OF LEARNED HAND* 155, 164 (I. Dilliard 3d ed. 1960) (emphasis in original). This quotation is from the reprinted version of a 1942 speech by Judge Hand.

28 Perhaps a distinction between civil and criminal cases is appropriate (abuse of power being a greater problem in the latter). In civil cases, though, litigation represents: 1) the breakdown of private social order; 2) the failure of a moral agent to take responsibility for his or her acts (as in wrongfully denying liability); 3) an instance of greedy or grasping behavior (as in a wrongful claim for more than is justified); or 4) some combination of the above. These are not matters to be encouraged or lauded. Litigation certainly can often be a remedy for these social ills, but the search should be for ways to eliminate the necessity for the remedy. If the claim is made that litigation is a remedy for other social ills, the claim cannot also be made that the merits of disputes are un-

If it is not, some theory of litigation would so tell us, and thus we would be pushed once more back to where I think we should be. Who in the law schools knows more about litigation than those of you here? Who is better able to inform us about the medical analogy? Who is better qualified to extend our knowledge about the nature of different kinds of litigation? If this is what the NITA model is, and I note in this vein Michael Tigar's recent analysis of discovery costs,<sup>29</sup> I heartily endorse it and wish it well.

Does the analogy to masters' classes in music fare any better? On one plane it may—the plane of emulating a master's skills. There are certainly some problems, though. A musician's skills are deeply embedded in musical theory. The skills are taught not just to make the fingers quick and agile, but also to permit entry into the underlying musical schemes the score may instantiate. But again, we are brought to theory and to conceptual schemes. If NITA teaches the art of cross-examination in order to participate in a chain of thought leading to inquiry into the nature of the legal system, then it belongs in a university. If NITA is teaching skills just to teach skills in order to win cases, then the proper analogy is not to medical schools or to masters' classes, but to sports programs where the overriding objective often is to win at all costs. It is just for that reason that we see a nationwide trend against major sports programs on serious campuses. For the most part they are perversions of the aspirations of the universities.<sup>30</sup> Programs belong in the universities only if they emanate from a conceptual plane, even if a controversial one, and only if theories justifying the program can be articulated, tested, and justified.<sup>31</sup>

---

knowable. This is true of both civil and criminal cases.

29 See Taylor, *'Overconsumption' of Legal Services Is Sabotaging the Adversary System*, 16 LITIGATION NEWS, Oct. 1990, at 5 (discussing speech by Michael Tigar, "2020 Vision—A Bifocal View," Austin, Texas (1990)). Evidence scholars are also beginning to edge closer to systematic studies of litigation. See, e.g., Schum, *Probability and the Processes of Discovery, Proof, and Choice*, 66 B.U.L. REV. 825 (1986).

30 They remain perversions even if enjoyed by students and alumni. Analogously, skills training is often defended on the ground that it is popular in law schools. Pepe, *Clinical Legal Education: Is Taking Rites Seriously A Fantasy, Folly, or Failure?*, 18 U. MICH. J. L. REF. 307, 331 (1985). The question is why is it popular. If it is popular because it is intellectually challenging, which it may be, then that is unobjectionable. But it is quite another matter if skills training is popular as an escape from intellectual rigor. For an extended discussion of the problems of the rise of student consumerism, see D. RIESMAN, *ON HIGHER EDUCATION* (1980). See also Lubet, *Closed Minds and American Law Schools*, 75 CORNELL L. REV. 949 (1990) and Macey, *Macey Responds to Lubet*, 75 CORNELL L. REV. 959 (1990).

31 Condlin, *"Tastes Great, Less Filling": The Law School Clinic and Political Critique*, 36

Let me leave with you a different set of analogies.<sup>32</sup> Suppose a relative of yours told you that he or she was studying political science, and upon looking at the books used and the class descriptions, it became obvious that what "political science" meant was such things as how to lobby a Congressman successfully. Or suppose the subject was economics, and its focus was how to secure government grants. Would you think, "Well, that's necessary skills training," or would you think that the student was being shortchanged? My question for NITA is whether it will teach the practicalities of lobbying or the subtleties of political theory; or more precisely, if the realities of lobbying will be taught, will they be taught as ends in themselves or as part of a larger dialogue embedded in political theory.<sup>33</sup>

On a broader plane, the question is whether NITA will participate in the grand aspirations, however badly they are fulfilled day to day, of the university. Will NITA organize itself around the central idea of free inquiry, regardless whether motivated instru-

---

J. LEGAL EDUC. 45 (1986) makes, I believe, an analogous argument but one that is limited to critique as the alternative. That is only one alternative to completely atheoretical skills training. I may misunderstand the argument, though, for Condlin combines critique with "objective standards of justice and fairness," *id.* at 50-51, whereas given his emphasis on critique I would have thought the word "objective" to be otiose.

32 As David Luban points out, the analogy between the adversary system and science is somewhat strained; scientists do not, typically, try to rattle fellow scientists with cross-examination nor suppress probative evidence. David Luban, *supra* note 23, at 94. As telling as Professor Luban's ridicule of the Popperian analogy is, he nonetheless overlooks the possible incentive effects created by aspects of the adversary system. In this regard his argument is quite analogous to the various scholarly criticisms of the attorney-client privilege and work product doctrine, and may be equally susceptible to refutation along the lines developed in Allen et al., *supra* note 25.

33 Some advocates of skills training appear to articulate a dichotomy of skills versus doctrine. See, e.g., Pepe, *supra* note 30, at 331. I take it that it is obvious that doctrine does not equate with conceptualization in what I have been saying. I have never seen the argument made in the literature on skills training, but to some extent these programs may be a legacy of the unfortunate tendency in law schools to behave as though no questions had answers, and as though teaching students to "think like a lawyer" was the primary goal. It is not. We have knowledge, concepts, and theories. There are conceptual techniques to be mastered or refined, but they should then be put to use in the context of free inquiry. Other advocates of skills training seem to think the only alternative to skills training as "an empty technical exercise" is to connect the training "with a philosophy of lawyering that has a theory of justice as its object;" this remedy "requires a discussion of norms or values. And values discourse engages us in politics." Tomain & Solimine, *Skills Skepticism in the Postclinic World*, 40 J. LEGAL EDUC. 307, 316-17 (1990). Again, I realize that it is fashionable to think that the only alternative to dogma, whether it be skills training or doctrine, is politics, but that simply trivializes the meaning of "politics." There are numerous ways to systematize skills training so as to bring it within the aspirations of the university. Politicizing skills training may be one, but it is only one and probably not the best possibility.

mentally by notions of service, research, or teaching? Or will it retreat into the adversary system excuse?<sup>34</sup> In a sense this last question poses the issue of the compatibility of the values of the university and the legal system. Are they at odds? Hannah Arendt thought not, although the pursuit of knowledge may be at odds with politics:

It is quite natural that we become aware of the non-political and, potentially, even anti-political nature of truth . . . only in the event of conflict, and I have stressed up to now this side of the matter. But this cannot possibly tell the whole story. It leaves out of account certain public institutions, established and supported by the powers that be, in which, contrary to all political rules, truth and truthfulness have always constituted the highest criterion of speech and endeavor. Among these we find notably the judiciary, which either as a branch of government or as direct administration of justice is carefully protected against social and political power, as well as all institutions of higher learning, to which the state entrusts the education of its future citizens. To the extent that the Academe remembers its ancient origins, it must know that it was founded by the polis's most determined and most influential opponent. To be sure, Plato's dream did not come true: the Academe never became a counter-society, and nowhere do we hear of any attempt by the universities at seizing power. But what Plato never dreamed of did come true: The political realm recognized that it needed an institution outside the power struggle in addition to the impartiality required in the administration of justice; for whether these places of higher learning are in private or in public hands is of no great importance; not only their integrity but their very existence depends upon the good will of the government anyway. Very unwelcome truths have emerged from the universities, and very unwelcome judgments have been handed down from the bench time and time again; and these institutions, like other refuges of truth, have remained exposed to all the dangers arising from social and political power. Yet the chances for truth to prevail in public are, of course, greatly improved by the mere existence of such places and by the organization of independent, supposedly

---

34 I would also pose these questions for the rest of the law school curriculum. There is nothing peculiar about NITA in this regard, and "doctrinal" training certainly has the potential to be as atheoretical as skills training. One of the significant roles advocacy training in the law schools plays is as an "irritant" to the rest of the curriculum. This role alone probably justifies it.



disinterested scholars associated with them. And it can hardly be denied that, at least in constitutionally ruled countries, the political realm has recognized, even in the event of conflict, that it has a stake in the existence of men and institutions over which it has no power.<sup>35</sup>

---

35 H. ARENDT, *BETWEEN PAST AND FUTURE: EIGHT EXERCISES IN POLITICAL THOUGHT* 260-61 (1968).